REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3845

CHRISTOPHER J. OSBORN

Appellant

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee

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APPELLANT'S REPLY ARGUMENT

The Board misinterpreted and misapplied the law when it determined that the Veteran's in-service injuries were the result of willful misconduct solely on the basis that the Veteran consumed alcohol.

The Secretary's entire argument rests on a single assertion: that "it was entirely reasonably for the Board to infer, based on these facts . . . that the intoxication led to the physical altercation" that resulted in the Veteran's injuries. Sec. Brief at 6. This argument should be rejected by the Court. The Secretary fails to appreciate that the Board misinterpreted the law when it elected to "infer" a finding of willful misconduct solely on the basis that Appellant consumed alcohol.

In its decision, the Board made a favorable finding of fact that the Veteran's TBI and left eye disability were caused by the in-service assault. R-7. Specifically, an incident report revealed that the Veteran followed a friend to the house next door to their squad leader's home because they thought the squad leader would be there. R-1259. His friend got into an altercation and the Veteran "jumped in to break it up and then got jumped"[1] sustaining his injuries. *Id.* The sole question in this case is

[1]As noted in the opening brief, the Board erroneously averred that the Veteran "committed an assault, allegedly in defense of another." R-7. To be clear, the incident report explicitly stated that the Veteran "jumped in [the fight] to break it up and then got jumped." R-1259. The Board fails to point to any evidence supporting the suggestion that the Veteran "committed an assault." Furthermore, the fact that the incident report expressly states the Veteran "jumped in [the fight] to break it up" fully supports the Veteran's contention that he was acting in defense of another. *Id.*

whether the in-service injury was due to willful misconduct. In that regard, the Board determined that the Veteran's "intoxication led directly . . . to the physical altercation that he was involved in." R-6 (emphasis added). The Board failed to point to any evidence, beyond its own unilateral assumption, that it was an intoxicated state which "led directly" to the physical altercation. Accordingly, the Board misinterpreted the law when it failed to consider whether the Veteran engaged in "conscious wrongdoing" when he went into a house looking for his squad leader and tried to break up a fight. 38 C.F.R. § 3.1(n) (2016) ("Willful misconduct means an act involving conscious wrongdoing or known prohibited action.").

It was not the alcohol that "led directly" to the physical altercation. R-6. Rather, the incident report explicitly states that other individuals proceeded to "jump" the Veteran after he was merely trying to break up a fight. R-1259. The Board failed to explain how being attacked while coming to the defense of another involves "deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences" to constitute willful misconduct. 38 C.F.R. § 3.1(n)(1) (2016); *see Allen v. Principi*, 237 F.3d 1368, 1378 (Fed. Cir. 2001) ("[T]he VA [has] construed the term . . . to refer to an act of conscious wrongdoing, involving elements of intent and voluntariness.").

Alcohol consumption or alcohol abuse alone does not necessarily constitute willful misconduct. 38 C.F.R. § 3.301(c)(2) (2016); *see Martin v. McDonald*, 761 F.3d

1366, 1371 (Fed. Cir. 2014) ("Congress has taken action indicating that alcohol abuse and willful misconduct . . . are not coextensive."). Here, the Board erred to the extent that it found willful misconduct based solely on the Veteran's alcohol intake, and improperly determined that the Veteran's "intoxication led directly . . . to the physical altercation that he was involved in." R-6 (emphasis added). Because alcohol abuse and willful misconduct "are not coextensive," the Board's finding is insufficient to rebut the presumption that the Veteran's injuries were incurred in the line of duty and not caused by misconduct. *See Holton v. Shinseki*, 557 F.3d 1362, 1367 (Fed. Cir. 2009) ("By its plain terms, section 105(a) creates a presumption that an injury or disease incurred by a veteran during active service was incurred in the line of duty and not caused by the veteran's misconduct."); *see also Myore v. Brown*, 9 Vet.App. 498, 503 (1996) (remanding the Board's denial of benefits based on willful misconduct finding where "[t]he Board did not support its denial in this case by a finding that willful misconduct, under 38 U.S.C. § 105(a) and 38 C.F.R. § 3.1(n)(1), was shown by a preponderance of the evidence.").

At minimum, the Board's failure to point to any evidence to support its assumption that alcohol intake "led directly" to the Veteran to getting jumped while attempting to break up a fight renders its reasons and bases inadequate to rebut the presumption under 38 U.S.C. § 105(a) that the subsequent injuries suffered were incurred in the line of duty and not the result of the Veteran's own misconduct.

Holton, 557 F.3d at 1367. VA is required by law to set forth evidence that shows by a preponderance of the evidence that the in-service injury was proximately caused by an act of willful misconduct by the Veteran, and the evidence of record is insufficient to reach any such determination. *Myore*, 9 Vet.App. at 503. Thus, the Board's finding of willful misconduct was clearly erroneous and inconsistent with the law. Reversal of this finding is the appropriate remedy. 38 U.S.C. § 7261(a)(4); *see Guiterrez v. Principi*, 19 Vet.App. 1, 10 (2004) (Reversal of the Board's finding is justified since the only permissible view of both the evidence and the law is contrary to the Board's decision). In the alternative, remand is required for the Board to properly apply the law and provide adequate reasons and bases for its decision consistent with the foregoing arguments. 38 U.S.C. § 7104(d)(1).

As a final note, at no point in his brief does the Secretary cite to or discuss the foregoing case law and regulations pertaining to the concept of "willful misconduct." The Secretary does not even attempt to explain the Board's decision in the context of sections 3.1(n), 3.1(n)(2), 3.301(c)(2), or 38 U.S.C. § 105(a), nor does he provide any argument addressing the Board's misinterpretation of this applicable law. Thus, the Court may assume that the Secretary either concedes these points or is unable to articulate a legally sound basis for defending the Board's decision. *See MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) (Court noting that where the Secretary fails to respond appropriately, "the Court deems itself free to assume, and does conclude, the

points raised by appellant, and ignored by the General Counsel, to be conceded.").

CONCLUSION

Based on the foregoing reasons, as well as the arguments contained in the Appellant's opening brief, the Court should vacate the Board's decision and remand the appeal with instructions to readjudicate the claim in accordance with the Court's opinion.

Respectfully submitted,

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